

Complainant ( Minot )

v.

Respondent

### **I. COMPLAINANT'S CHARGE:**

Complainant, Complainant, alleged that he was denied a reasonable accommodation and terminated due to his disability and requests for need for reasonable accommodations.

### **II. RESPONDENT'S ANSWER:**

Respondent, denied the allegation of discrimination and said that Complainant was discharged due to lack of work and not his heart condition.

### **III. JURISDICTIONAL DATA:**

- 1) Date of alleged discrimination: November 7, 2007.
- 2) Date complaint filed with the Maine Human Rights Commission: January 8, 2008.
- 3) Respondent employs 35 employees and is subject to the Maine Human Rights Act, Americans with Disabilities Act, as well as state and federal employment regulations.
- 4) Complainant is represented by Chad Hansen, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution conference.

### **IV. DEVELOPMENT OF FACTS:**

- 1) The parties and issues in this case are as follows:
  - a) The Complainant, Complainant, is a male with a heart condition who worked for Respondent as an Assistant Service Manager between August, 2005 and November, 2007.
  - b) The Respondent, operates an automobile business in Auburn, Maine.
  - c) Important third parties: Owner, JE; Office Manager, AK; Service Manager, LG; Assistant Service Manager 2, JS; Assistant Service Manager 3, RJ; Assistant Service Manager 4, JE; Assistant Service Manager 5, AJ; Newly-Created Parts Department Position, CM.

- d) Complainant's employment was terminated on November 7, 2007.
  - e) Complainant, Mr. Complainant, alleged that he was denied a reasonable accommodation and terminated due to his disability and requests for need for reasonable accommodations. Respondent, denied the allegation of discrimination and said that Complainant was discharged due to lack of work and not his heart condition.
- 2) This brief chronology will help explain the order of relevant events:
- a) August, 2005 through November, 2007: Complainant was employed by Respondent.
  - b) August, 2007, Complainant suffered a heart attack.
  - c) September 4, 2007, Complainant was cleared to return to work without limitations.
  - d) October, 2007, bonuses were distributed for an "above average" month.
  - e) November 1, 2007, CM was hired into a newly-created position.
  - f) November 7, 2007, Complainant's employment was terminated, with the reason given that there had been a "downturn in business."
- 3) Mr. Complainant provided the following concerning his employment with Respondent:
- a) "I was employed by Respondent as an Assistant Service Manager from approximately August, 2005 until my termination on November 7, 2007."
  - b) "I was qualified to perform the duties of my job during the entire time I worked at Respondent."
  - c) "I believe that I performed my job in a satisfactory manner."
  - d) "In August 2007, I suffered a heart attack. As a result, I required approximately two and a half weeks of medical leave."
  - e) "Respondent hired a permanent replacement for my position in the two and a half weeks that I was out recovering from my heart attack."
  - f) "After I returned to work at Respondent, I was placed in the newly-created position of Dispatcher, with the reason given that this position would be an "easier and less stressful position" according to the Service Manager. The problem, though, was that there was no opportunity for incentive pay, even though the salary was the same. This impacted the terms and conditions of my employment. When the replacement for my Assistant Service Manager position quit, I was returned to my Assistant Service Manager position."
  - g) "After my return to work on September 4, 2007, I needed to leave work 30 minutes early two times per week in order to go to cardiac rehabilitation. I made up this time away from work at other times."

- h) "My need for two and a half weeks of leave after my heart attack and my need to leave work 30 minutes early two times per week were reasonable accommodations for my disability."
  - i) "On November 7, 2007, I was terminated. I was told that I was being laid off due to a 'downturn in business.'"
  - j) "I believe that the reasons given for my termination were pretexts."
  - k) "I believe that the real reasons for my termination were my disability and my requests for and need for reasonable accommodations for my disability."
- 4) Owner provides the following concerning Mr. Complainant's tenure and the circumstances leading to his termination:
- a) "Mr. Complainant was discharged due to lack of work and not his heart condition. We currently have 3 employees who are employed by us with heart conditions."
  - b) "We let Mr. Complainant leave work at 4:00 or 4:30pm for therapy when he needed to leave."
  - c) "Mr. Complainant came back to work on September 4, 2007. On September 6, 2007, our Toyota reps came in to discuss adding a Dispatch position to see if it would be warranted with the volume of work that we had. We put Mr. Complainant in this position, since he was familiar with our workflow. We then hired Assistant Service Manager 4 on September 13, 2007 to replace Mr. Complainant. When Assistant Service Manager 4 decided that the position was not for him, we also decided to no longer have a Dispatch position because the job did not fit our needs, and returned Mr. Complainant to his original position of Assistant Service Manager."
  - d) "Due to work volume decreasing, we had to reduce our personnel. Mr. Complainant was the least productive Service Advisor at the time."
  - e) "Mr. Complainant was released for looking at want ads, employment ads while on our clock."
  - f) "It was hard for me to look at the future with someone who was looking at want ads for other employment while on duty. Service Manager actually saw online job site icons at the bottom of the computer screen when she used the computer right after Mr. Complainant had used it."
- 5) Respondent's Service Manager offers the following:
- a) "I worked very well with Mr. Complainant. I visited him while he was in the hospital and told him that we would do whatever we could to be supportive."

- b) "I asked him for a note from his physician because we needed this documentation for the file. We needed the note from the rehabilitation physician practice as well, and as his immediate supervisor, I requested that he provide these."
  - c) "At about the time Mr. Complainant came back to work on September 4, 2007, Toyota had recommended a Dispatcher position, which program started on September 13, 2007. Mr. Complainant was very organized and this was a less stressful position. Although I didn't think that he was less able, I just thought it would be better for him. The salary was the same, although the bonus plan was different. After trying out the Dispatcher program, we just didn't think that the Dispatcher job was needed as a full-time position because we're a small dealership. We returned Mr. Complainant to the service position and never replaced the Dispatcher. In fact, I, as Service Manager, do that work now."
- 6) Mr. Complainant explains that, prior to the Issues and Resolution conference, he had been consistently told that his termination was "due to a downturn in business." At the May 20, 2009 Issues and Resolution conference, Owner contradicted the reason for his termination, and Mr. Complainant heard these allegations for the very first time:
- a) "Mr. Complainant was let go because he was unproductive and spent a lot of his time looking for other jobs, both in the newspaper and online."
  - b) "Although we have no documentation to support these allegations, he was rude to customers."
- 7) Mr. Complainant asserts that because Owner admitted that the original reason for the termination is not the real reason, evidence of pretext can be drawn:
- a) "These new reasons are not supported by evidence."
  - b) "I was never approached about customer complaints, and given the length of employment, it seems unlikely that an employer would not address the issues immediately, in an effort to avoid further negative reaction from valued customers."
- 8) Mr. Complainant asserts that it is undisputed that there is no mention in his personnel file or in any of Respondent's communications about customer complaints and a passive job search, while on his employer's clock:
- a) "The new reasons are weak, implausible, inconsistent and contradicted by Owner's prior verbal and written statements."
  - b) "Owner's reason for terminating my employment is a pretext for discrimination, as demonstrated here and bolstered by the fact that, after two years of good work, I was terminated within two months of using medical leave and informing my employer that I required an additional accommodation for my disability of leaving work a little early for rehab appointments."

## **V. ANALYSIS:**

- 1) The Maine Human Rights Act provides that the Commission or its delegated investigator “shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 M.R.S.A. § 4612(1)(B). The Commission interprets the “reasonable grounds” standard to mean that there is at least an even chance of Complainant prevailing in a civil action. More particularly, “reasonable grounds” exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence, so that there is at least an even chance of Complainant proving in court that unlawful discrimination occurred. Complainant must prove unlawful discrimination in a civil action by a “fair preponderance of the evidence.” 5 M.R.S.A. § 4631.

### **Reasonable Accommodation**

- 2) Pursuant to the Maine Human Rights Act, unlawful discrimination includes “[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity.” 5 M.R.S.A. §§ 4553(2)(E), 4572(2).
- 3) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that he is a “qualified individual with a disability” within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant’s physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent’s failure to do so affected the terms, conditions, or privileges of Complainant’s employment. *See id.*
- 4) The Maine Human Rights Act, 5 M.R.S.A. § 4553-A, defines “physical or mental disability,” in relevant part, as follows:

**1. Physical or Mental Disability, defined.** Physical or mental disability” means:

A. A physical or mental impairment that:

- (1) Substantially limits one or more of a person’s major life activities;
- (2) Significantly impairs physical or mental health; or
- (3) Requires special education, vocational rehabilitation or related services;

B. Without regard to severity unless otherwise indicated: absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn’s disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson’s disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury;

C. With respect to an individual, having a record of any of the conditions in paragraph A or B; or

D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A or B.

**2. Additional terms.** For purposes of this section:

A. The existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication, auxiliary aids or prosthetic devices; and

B. "Significantly impairs physical or mental health" means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population.

- 5) The term "qualified individual with a disability" means "an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." 5 M.R.S.A. § 4553(8-D). Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S.A. § 4553(9-A).
- 6) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable him to perform the essential functions of his job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." See *Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S.A. § 4553(9-B).
- 7) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. See *Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.
- 8) Here, Mr. Complainant establishes a claim of discrimination by showing that, (1) he is a qualified individual with a disability as defined under MHRA, (2) that Respondent knew of his physical limitations and failed to reasonably accommodate them, and (3) this affected his employment. As shown above in paragraph 4(1-B), heart disease is included as a disability under MHRA so that fact is not in dispute.
- 9) Mr. Complainant demonstrated that he is a "qualified individual with a disability" and could perform the essential functions of the job with a reasonable accommodation that he be allowed to leave 30 minutes or so before the end of the workday two days per week for rehab. No one disputed his abilities as an Assistant Service Manager before his heart attack, and he was making up any lost time during the work week. Nevertheless, when Complainant returned from his two-week leave of absence with "no limitations," he was not returned to his former position but was placed in a position that had less responsibility, prestige, or opportunity for incentive pay. It was not until the individual who assumed

Complainant's former position quit that Complainant was returned to his former position. A denial of reasonable accommodation is found.

### **Termination - Disability**

- 1) The Maine Human Rights Act provides, in part, that it is unlawful for an employer to terminate an employee on the basis of disability. 5 M.R.S.A. § 4572(1)(A).
- 2) Because there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). See *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
- 3) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) he belonged to a protected class, (2) he performed his job satisfactorily, (3) his employer took an adverse employment decision against him, and (4) his employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1<sup>st</sup> Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1<sup>st</sup> Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.
- 4) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. See *Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. See *id.* Complainant's burden may be met either with affirmative evidence of pretext or by the strength of Complainant's evidence of unlawful discriminatory motive. See *City of Auburn*, 408 A.2d at 1262, 1267-68.
- 5) In order to prevail, Complainant must show that he would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. See *City of Auburn*, 408 A.2d at 1268.
- 6) Mr. Complainant establishes a prima-facie case here by showing that he is (1) disabled (see analysis above), (2) that he performed his job satisfactorily in the time he worked at Respondent, (3) he was terminated and (4) there was a continuing need for his work to be done (as evidenced by the fact that Assistant Service Manager 5 was hired in January, just two months after his termination).
- 7) While there is no overt evidence of unlawful discriminatory motive, there is evidence of pretext, given Respondent's shifting reasons for terminating Complainant. Pretext can be shown with "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a factfinder could infer that the employer did not act for the asserted non-discriminatory reasons." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1<sup>st</sup> Cir. 2000).

- 8) In Respondent's submission received April 10, 2008, they allege that it was a legitimate business decision to terminate him "due to lack of work."
- 9) However, at the Issues and Resolution conference on May 20, 2009, Owner contradicted the reason for Mr. Complainant's termination. For the very first time, Mr. Complainant and the Commission were told that "Mr. Complainant was let go because he was unproductive and spent a lot of his time looking for other jobs, both in the newspaper and online." Owner further stated that, "Although we have no documentation to support these allegations, Mr. Complainant was rude to customers."
- 10) Complainant asserts that, because Owner admitted that the original reason for the termination is not the real reason, evidence of pretext can be drawn. These proffered reasons are not supported by evidence and the new reasons are weak, implausible, inconsistent and contradicted by Owner's prior verbal and written statements. Mr. Complainant states that Owner's reason for terminating his employment is a pretext for discrimination, as demonstrated here and bolstered by the fact that, after two years of good work, he was terminated within two months of using medical leave and informing his employer that he required an additional accommodation for his disability, specifically, leaving work a little early two days per week for rehab appointments.

## **VI. RECOMMENDATION**

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that Respondent discriminated against Complainant on the basis of disability by failing to reasonably accommodate him and by terminating his employment.
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

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Patricia E. Ryan, Executive Director

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Michèle Dion, Investigator